

June 14, 2006

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2006-17 is available for public comments under this procedure. It was requested by, Michael Kearney, on behalf of The Berkeley Electric Cooperative, Inc. and its separate segregated fund, the Berkeley Cooperative, Inc. Political Action Committee.

Proposed Advisory Opinion 2006-17 is scheduled to be on the Commission's agenda for its public meeting of Thursday, June 22, 2006.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on June 21, 2006.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2006-17, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 14, 2006

MEMORANDUM

TO: The Commission

THROUGH: Robert J. Costa
Acting Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Mai T. Dinh
Assistant General Counsel

Anthony Buckley
Attorney

Subject: Draft AO 2006-17

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for June 22, 2006.

Attachment

1 ADVISORY OPINION 2006-17

2
3 Michael Kearney, Treasurer
4 Berkeley Electric Cooperative, Inc. Political Action Committee
5 P.O. Box 1234
6 Moncks Corner, SC 29461
7
8

DRAFT

9 Dear Mr. Kearney:

10 We are responding to your advisory opinion request on behalf of the Berkeley
11 Electric Cooperative, Inc. (“BEC” or “the Cooperative”) and its separate segregated fund,
12 the Berkeley Electric Cooperative, Inc. Political Action Committee (“BEC PAC”),
13 concerning the application of the Federal Election Campaign Act of 1971, as amended
14 (the “Act”), and Commission regulations to BEC’s solicitation of its executive and
15 administrative personnel and its members, including members who are employees, for
16 contributions to BEC PAC and certain other organizations. The Commission concludes
17 that BEC may solicit its executive and administrative personnel, and its members, for
18 contributions to BEC PAC and to the Action Committee for Rural Electrification
19 (“ACRE”). The Commission further concludes that BEC may use the proposed form to
20 solicit these contributions from its executive and administrative personnel and its
21 employees who are members, and that BEC may use its payroll deduction system to
22 collect and forward these contributions from them.

23 ***Background***

24 The facts presented in this advisory opinion are based on your letters received on
25 March 8 and May 1, 2006, and your telephone conversation with Commission staff on
26 May 4, 2006.

1 BEC is an electric distribution cooperative incorporated under the laws of South
2 Carolina. It is composed of members who pay a membership fee to BEC and agree to
3 purchase electricity from BEC, as well as to be bound by and comply with all of the other
4 provisions of BEC's Articles of Incorporation and Bylaws. BEC Bylaws, Article I,
5 Section 1.02. BEC's bylaws provide that a Board of Trustees manages its business and
6 affairs. BEC Bylaws, Article IV, Section 4.01. Members of the Board of Trustees must
7 be members of the Cooperative. BEC Bylaws, Article IV, Section 4.02(d). BEC
8 members elect the Board members at the Cooperative's annual meeting. BEC Bylaws,
9 Article IV, Section 4.03. Membership may be evidenced by a certificate of membership.
10 BEC Bylaws, Article VIII, Section 8.01. Many of BEC's employees, including executive
11 and administrative personnel, are also members of BEC. BEC PAC is BEC's separate
12 segregated fund and is registered with the Commission.

13 The National Rural Electric Cooperative Association ("NRECA") was established

14 To engage in the compilation and dissemination of information with respect to
15 rural electrification and the furnishing of other services to rural electric
16 cooperatives and others in connection with the coordination, advancement and
17 development of rural electrification in the United States . . . for the primary and
18 mutual benefit of the members of the Association and their members, as ultimate
19 consumers.

20
21 NRECA Bylaws, Article II. NRECA is a nonprofit corporation under the District of
22 Columbia Cooperative Association Act. NRECA Articles of Incorporation, Preamble.

23 ACRE is NRECA's separate segregated fund and is registered with the Commission.

24 Electric Cooperatives Help Organization ("ECHO") is registered with the South
25 Carolina Ethics Commission. ECHO supports South Carolina State and local candidates.

1 The BEC Employee Fund is registered with the South Carolina Ethics Commission. It
2 makes contributions to South Carolina State and local candidates.

3 BEC wishes to use a specific form to solicit contributions for BEC PAC and
4 ACRE. See BEC proposed solicitation form (attached hereto as Exhibit 1). The form
5 offers three options for contributing: 1) recommended contribution amounts to be
6 deducted from the employee's paycheck each pay period; 2) a one-time contribution, the
7 amount of which is left to the discretion of the employee; or 3) an election not to
8 participate. The form notes that the recommended contribution amounts are "merely
9 suggestions," and that employees may choose to give "more or less than those stated."
10 The form further states, "BEC will not favor nor disfavor employees according to
11 pledged donations." An additional statement reads "I am also fully aware that should I
12 elect not to participate I may do so without any concern of retaliation." In addition, a
13 bold faced sentence states that the purposes of the organizations for which contributions
14 are being solicited is "for the benefit of political candidates and activities on a state and
15 national level that support rural electric cooperatives."

16 *Questions Presented*

- 17 1. *May BEC solicit its executive and administrative personnel, and its members,*
18 *including members who are employees, for contributions to BEC PAC?*
19 2. *May BEC solicit its executive and administrative personnel, and its members,*
20 *including members who are employees, for contributions to ACRE?*
21 3. *If BEC may solicit these persons for contributions, may it use its proposed*
22 *solicitation form, and may it collect contributions from them by means of payroll*
23 *deductions?*

1 ***Legal Analysis and Conclusions***

2 *Question 1. May BEC solicit its executive and administrative personnel, and its*

3 *members, including members who are employees, for contributions to BEC PAC?*

4 Yes, BEC may solicit its executive and administrative personnel, and its
5 members, including members who are employees, for contributions to BEC PAC because
6 it is a membership organization and these individuals are within its solicitable class.

7 Commission regulations define a “membership organization” as a trade
8 association, cooperative, or corporation without capital stock that:

- 9 (i) Is composed of members, some or all of whom are vested with the
10 power and authority to operate or administer the organization, pursuant to
11 the organization’s articles, bylaws, constitution or other formal
12 organizational documents;
13 (ii) Expressly states the qualifications and requirements for membership in
14 its articles, bylaws, constitution or other formal organizational documents;
15 (iii) Makes its articles, bylaws, constitution, or other formal organizational
16 documents available to its members upon request;
17 (iv) Expressly solicits persons to become members;
18 (v) Expressly acknowledges the acceptance of membership, such as by
19 sending a membership card or including the member’s name on a
20 membership newsletter list; and
21 (vi) Is not organized primarily for the purpose of influencing the
22 nomination for election, or election, of any individual to Federal office.

23
24 11 CFR 114.1(e)(1)(i)-(vi); *see also* 11 CFR 100.134(e)(1)-(6).
25

26 BEC is composed of members and its members qualify as members under the
27 Commission’s regulations because they affirmatively decide to become a member, affirm
28 their memberships frequently through the payment of monthly electric bills, and have the
29 ability to vote directly for the Board of Trustees. *See* 11 CFR 114.1(e)(2) (defining
30 “member”).

1 The members administer BEC by electing BEC’s Board of Trustees. The
2 qualifications for membership in BEC are clearly set forth in BEC’s bylaws. The formal
3 organizational documents are available to members upon request. Through its website,
4 BEC solicits persons to become members of the Cooperative by establishing electric
5 service through BEC and the website provides an on-line application for membership.
6 Membership in BEC may be acknowledged via issuance of a membership certificate.
7 Finally, BEC was organized primarily to distribute electric service and not for the
8 purpose of influencing elections. Because it satisfies these requirements, BEC qualifies
9 as a “membership organization.”

10 Under the Act and Commission regulations, a membership organization or a
11 cooperative may solicit contributions to its separate segregated fund from its members
12 and its executive and administrative personnel. *See* 2 U.S.C. 441b(b)(4)(C) and 11 CFR
13 114.7(a).¹ Thus, BEC may solicit its executive and administrative personnel, and its
14 members, including members who are employees, for contributions to its separate
15 segregated fund, BEC PAC.

16 *Question 2. May BEC solicit its executive and administrative personnel, and its*
17 *members, including members who are employees, for contributions to ACRE?*

18 Yes, BEC may solicit its executive and administrative personnel, and its
19 members, including members who are employees, for contributions to ACRE because it
20 is affiliated with ACRE’s connected organization, NRECA, and it may act as a collecting
21 agent for ACRE.

¹ “Executive or administrative personnel” is defined at 2 U.S.C. 441b(b)(7) and 11 CFR 100.134(d) and 114.1(c).

1 A collecting agent may collect and transmit contributions to one or more separate
2 segregated funds to which the collecting agent is related. *See* 11 CFR 102.6(b)(1). One
3 example of a collecting agent is a “parent, subsidiary, branch, division, department, or
4 local unit of the connected organization of the separate segregated fund.” 11 CFR
5 102.6(b)(1)(iii).

6 The Commission previously determined that NRECA and its member
7 cooperatives, taken together, form the type of rural cooperative covered by 11 CFR
8 114.7(k)(1). *See* Advisory Opinion 1999-40 (ACRE).² As such, the member
9 cooperatives are affiliated with NRECA. *Id.* BEC is a member cooperative of NRECA
10 and, as stated in your request, its relationship with NRECA is identical to NRECA’s
11 relationships with other local distribution cooperatives, as described in Advisory Opinion
12 1999-40 (ACRE). Thus, BEC is affiliated with NRECA.

13 The Commission further determined that, as affiliates of NRECA, distribution
14 cooperatives are local units of NRECA. As local units, the distribution cooperatives may
15 act as collecting agents for contributions to NRECA’s separate segregated fund, ACRE.
16 *See* Advisory Opinion 1999-40 (ACRE). Thus, BEC may be a collecting agent for
17 ACRE. As a collecting agent for ACRE, BEC may solicit contributions for ACRE from
18 those persons permitted to be solicited under 11 CFR part 114. *See* 11 CFR 102.6(c)(2).
19 As noted above, those persons include BEC’s executive and administrative personnel and
20 its members, including members who are employees.

21 Because BEC and NRECA are affiliated, their separate segregated funds are
22 considered one political committee for purposes of applicable contribution limitations.

² The Commission presumes that the facts that formed the basis for this determination have not materially changed.

1 See 11 CFR 114.7(k)(1). Accordingly, you should ensure that no individual designates
2 contributions to BEC PAC and ACRE in any calendar year that would, when combined,
3 exceed the limitation at 2 U.S.C. 441a(a)(1)(C) and 11 CFR 110.1(d).

4 *Question 3. If BEC solicits contributions from its executive and administrative*
5 *personnel and its members, including members who are employees, may it use its*
6 *proposed solicitation form and may it collect the contributions from them by means of*
7 *payroll deductions?*

8 Yes, BEC may use its proposed solicitation form (attached Exhibit 1 hereto) and
9 may use payroll deductions to collect and forward certain contributions to BEC PAC and
10 ACRE.

11 Under the Act and Commission regulations, at the time solicitations are made,
12 solicitations for contributions to separate segregated funds must inform employees and
13 members of the political purposes of the fund, and that any employee or member solicited
14 must be informed of the right to refuse to contribute without any reprisal. See 2 U.S.C.
15 441b(b)(3)(B) and (C); *see also* 11 CFR 114.5(a)(3) and (4). If guidelines for
16 contributions are suggested, the person being solicited must be informed that the
17 guidelines are merely suggestions, that the individual is free to contribute more or less
18 than the guidelines suggest, and that an individual will not be favored or disadvantaged
19 by reason of the amount of their contribution or their decision not to contribute. 11 CFR
20 114.5(a)(2). A written solicitation for contributions to a separate segregated fund that is

1 addressed to an employee or member must contain statements that comply with these
2 requirements. 11 CFR 114.5(a)(5).³

3 The proposed form meets the requirements of 11 CFR 114.5(a). *See* 2 U.S.C.
4 441b(b)(3). A bold faced sentence states that the purposes of the organizations for which
5 contributions are being solicited (including ACRE and BEC PAC) is “for the benefit of
6 political candidates and activities on a state and national level that support rural electric
7 cooperatives.” *See* BEC proposed solicitation form (Exhibit 1). The form offers three
8 options for contributing. It notes that the first option contains “merely suggestions,” and
9 that employees may choose to give “more or less than those stated.” *Id.* The form
10 further states, “BEC will not favor nor disfavor employees according to pledged
11 donations.” *Id.* An additional statement reads “I am also fully aware that should I elect
12 not to participate I may do so without any concern of retaliation.” *Id.* Taken together,
13 these statements comply with 11 CFR 114.5(a)(2) and (a)(4). Accordingly, the proposed
14 form meets all of the requirements of 11 CFR 114.5(a)(5).

15 The proposed form identifies five different categories of employees: supervisory
16 hourly employees, non-supervisory hourly employees, supervisory salaried employees,
17 non-supervisory salaried employees, and salaried staff. *See* Exhibit 1. BEC may solicit
18 salaried supervisory employees and staff because they are “executive and administrative
19 personnel.” *See* 2 U.S.C. 441b(b)(7); 11 CFR 100.134(d) and 114.1(c). Because hourly
20 employees and salaried non-supervisory employees do not meet the definition of
21 “executive and administrative personnel,” BEC may solicit only hourly employees and
22 salaried non-supervisory employees who are also members of BEC. *See id.* To make

³ Solicitations by collecting agents must also meet all of these requirements. *See* 11 CFR 102.6(c)(2).

1 clear that BEC is only soliciting contributions from its solicitable class, the proposed
2 form should be modified to add “(BEC members only)” directly below “Non-supervisor”
3 and “Supervisor” under “Hourly,” and directly below “Non-supervisor” under “Salaried.”

4 With respect to the use of payroll deductions to collect contributions for BEC
5 PAC, the Act and Commission regulations allow a corporation to enroll members of its
6 restricted class in a payroll deduction system that deducts contributions from payroll
7 checks to make contributions to the corporation’s separate segregated fund. *See* 2 U.S.C.
8 441b and 11 CFR 114.2(f)(4)(i). Accordingly, BEC may use payroll deductions to
9 collect and forward contributions to BEC PAC from its executive and administrative
10 personnel and its employees who are BEC members.

11 BEC may also use payroll deductions to collect contributions to ACRE. Because
12 BEC is a collecting agent for ACRE, see above, BEC may pay any or all costs incurred in
13 soliciting and transmitting contributions to ACRE. *See* 11 CFR 102.6(c)(2)(i). The
14 Commission previously determined that an affiliated entity acting as a collecting agent
15 may use payroll deductions to collect contribution from its executive and administrative
16 personnel for the separate segregated fund of another entity with which it is affiliated.
17 *See* Advisory Opinion 2000-15 (CUNA). The Commission concludes that employees
18 who are members of BEC should be treated in the same manner as executive and
19 administrative personnel for purposes of payroll deductions. Accordingly, BEC may use
20 payroll deductions to collect and forward contributions from executive and administrative
21 personnel and member employees to ACRE.

22 The Commission expresses no opinion regarding BEC’s solicitation of its
23 executive and administrative personnel and its members for donations to ECHO and the

1 BEC Employees Fund. Given that these two organizations are not involved in Federal
2 elections, questions regarding donations to them are not within the Commission's
3 jurisdiction.

4 This response constitutes an advisory opinion concerning the application of the
5 Act and Commission regulations to the specific transaction or activity set forth in your
6 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
7 of the facts or assumptions presented, and such facts or assumptions are material to a
8 conclusion presented in this advisory opinion, then the requestor may not rely on that
9 conclusion as support for its proposed activity.

10
11 Sincerely,
12
13

14
15 Michael E. Toner
16 Chairman
17
18

19 Enclosure (Advisory Opinions 1999-40 and 2000-15)